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May 6, 2009

VIA HAND DELIVERY

Ms. LaDonna Castañuela
Office of Chief Clerk
Texas Commission on Environmental Quality
12015 Park 35 Circle, MC 105
Building F, 1st Floor
Austin, Texas 78753

State Office of Administrative Hearings
ATTN: DOCKET SERVICES
William P. Clements Building
300 W. 15th Street, Room 504
Austin, Texas 78701

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 MAY - 6 PM 3:23
CHIEF CLERKS OFFICE

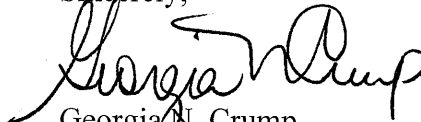
Re: SOAH Docket No. 582-09-1168, TCEQ Docket No. 2008-1645-UCR;
Petition of West Travis County Municipal Utility District No. 3

Dear Clerks:

Enclosed is the Brief of West Travis County Municipal Utility District No. 3 Opposing the Request for Answers to Certified Questions for filing in the above-referenced matter. Please file stamp the extra copies provided and return via our messenger. Thank you for your assistance.

By copy of this letter and according to the certificate of service, all parties of record have been served.

Sincerely,



Georgia N. Crump
Attorney for West Travis County Municipal Utility
District No. 3

GNC/jmc
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Enclosures

SOAH DOCKET NO. 582-09-1168
TCEQ DOCKET NO. 2008-1645-UCR

2009 MAY -6 PM 3: 23

PETITION OF WEST TRAVIS §
COUNTY MUNICIPAL UTILITY § BEFORE THE STATE OFFICE
DISTRICT NO. 3 FOR REVIEW OF § OF
RAW WATER RATES § ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

**BRIEF OF
WEST TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 3
OPPOSING THE REQUEST FOR ANSWERS TO CERTIFIED QUESTIONS**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Now comes West Travis County Municipal Utility District No. 3 (“MUD 3”) and files this Brief Opposing the Request for Answers to Certified Questions (“Request”) filed in the above-entitled docket on May 1, 2009. In support hereof MUD 3 shows as follows:

I. INTRODUCTION

The West Travis County Municipal Utility District No. 3 filed a petition with the Texas Commission on Environmental Quality (the “TCEQ” or the “Commission”) in October 2008 requesting a review of an increase in contractual raw water rates imposed by the Lower Colorado River Authority (“LCRA”) in August 2008 (“MUD 3’s Raw Water Petition”). This Petition was filed under the provisions of Texas Water Code § 12.013.

After the TCEQ referred MUD 3’s Raw Water Petition to the State Office of Administrative Hearings (“SOAH”), Administrative Law Judge (“ALJ”) Qualtrough ordered the parties to submit briefs on procedural issues. These issues included whether the hearing should be conducted in a single-phase rather than bifurcated hearing process and whether MUD 3 was required to prove that the rates charged by LCRA were adverse to the public interest. In its brief, the LCRA argued that Texas Water Code § 49.2122 applied to the dispute. MUD 3 disputed the application of § 49.2122 to its Petition and the review of the rates charged by LCRA for raw

water sold to MUD 3 under two contracts. In Judge Qualtrough's response to these procedural briefs (Order No. 3), she declined to address whether § 49.2122 applied to the case, determining on other grounds that MUD 3 had the burden of proof. Judge Qualtrough also stated the following:

After establishing that the MUD has the burden of proof, the ALJ declines to rule at this point on whether the MUD must prove that LCRA acted arbitrarily and capriciously as purportedly required under section 49.2122 of the Texas Water Code. The legislative history cited by the MUD suggests that *section 49.2122(b) applies only to the process of a district's designation of classes of ratepayers, which is not the situation presented in this proceeding.*¹

Judge Qualtrough is joined by two other ALJs in the Request. Judge Newchurch had occasion to consider the applicability of § 49.2122 in a retail rate dispute in *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District ("Clear Brook City MUD")*.² Judge Card also addressed the applicability of § 49.2122 in another retail rate case which coincidentally also involves LCRA and MUD 3: *Appeal of the Retail Water and Wastewater Rates of the Lower Colorado River Authority* ("LCRA Retail Rate Case").³

II. THE COMMISSION SHOULD DECLINE TO ANSWER

MUD 3 opposes both the Request and the inclusion of its Raw Water Petition in the Request. None of the questions raised by the ALJs need to be addressed in the context of MUD 3's Raw Water Petition. Indeed, no attempt has been made to justify the inclusion of MUD 3's Raw Water Petition in the Request.

¹ Order No. 3 at 12 (March 23, 2009) (emphasis added).

² SOAH Docket No. 582-08-1700, TCEQ Docket No. 2008-0091-UCR.

³ SOAH Docket No. 582-08-2863, TCEQ Docket No. 2008-0093-UCR. MUD 3 is also filing a joint response with West Travis County MUD No. 5 opposing the Request as it pertains to the LCRA Retail Rate Case.

As is admitted in the Request itself, the three cases in which the ALJs have filed their Request are “three factually distinct cases involving different aspects of the Commission’s jurisdiction over the ratemaking authority of districts.”⁴ Each case can proceed on its own merits and according to the statutory and regulatory provisions that pertain to each case. It matters not in MUD 3’s Raw Water Petition how Judge Newchurch or Judge Card determine to assign the burden of proof in their cases or the statutory provisions they rule to be relevant to their cases. Therefore, MUD 3 requests that the Commission either deny the Request, or in the alternative, exclude MUD 3’s Raw Water Petition from the virtual consolidation with the other dockets that the Request envisions.

A. The Request is Inappropriate for Factually Distinct Cases

As the ALJs acknowledge, the three dockets that have been abated pending the resolution of the Request are factually distinct cases addressing very different types of rates and brought under different statutory provisions. The Request should not be granted because the virtual consolidation of the three distinct dockets for that purpose is inappropriate. Further, it is unnecessary to the resolution of the merits of MUD 3’s Raw Water Petition to have the questions posed by the ALJs answered by the Commission.

1. MUD 3’s Raw Water Petition is factually distinct from *Clear Brook City MUD*.

In *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, the owner of an apartment complex appealed the rates for sewer and water service charged by Clear Brook City Municipal Utility District. In Order No. 6 in that docket, Judge Newchurch applied the presumption articulated in § 49.2122(b) that all appropriate factors

⁴ Request for Answers to Certified Questions at 1 (May 1, 2009).

had been weighed and considered by Clear Brook City MUD, thus he assigned the burden of proof to the petitioner to show that Clear Brook City MUD acted arbitrarily and capriciously.⁵

As Judge Qualtrough accurately determined in her Order No. 3, the legislative history of § 49.2122 supports its application to the process of a district's designation of classes of ratepayers, "which is not the situation presented in [MUD 3's Raw Water Petition] proceeding."⁶ In comparison to the facts alleged in *Clear Brook City MUD*, MUD 3's Raw Water Petition does **not** challenge rate classes established by LCRA, but is rather a petition to review an increase in raw water rates. Nothing in Order No. 6 in *Clear Brook City MUD* impacts either the ability of the parties in MUD 3's Raw Water Petition docket to present their cases or the ability of Judge Qualtrough to apply the statutes and the Commission's regulations. Both of these cases can proceed on their own merits without reference to each other.

Further, the petition in *Clear Brook City MUD* was brought under the provisions of Chapter 13 of the Texas Water Code, and Order No. 6 of that docket is clearly limited to cases brought under Chapter 13. To the extent there is any discrepancy or conflict regarding the application of § 49.2122 to retail water rates, MUD 3's Raw Water Petition brought under Texas Water Code § 12.013 should not be included in such a conflict, and the focus should be solely on *Clear Brook City MUD* wherein there is an actual dispute regarding the application of § 49.2122 to a Chapter 13 proceeding.

2. MUD 3's Raw Water Petition is factually distinct from LCRA's Retail Rate Case.

MUD 3's Raw Water Petition is also factually distinct from LCRA's Retail Rate Case. MUD 3, along with West Travis County Municipal Utility District No. 5 and the City of Bee

⁵ *Petition of Ratepayers Appealing Rates Established by Clear Brook City Municipal Utility District*, SOAH Docket No. 582-08-1700, TCEQ Docket No. 2008-0091-UCR, Order No. 6 at 7 (Oct. 22, 2008).

⁶ Order No. 3 at 12 (March 23, 2009).

Cave, filed a petition for a review of the retail water rates charged by LCRA.⁷ This retail rate appeal challenged rates for *potable water*, whereas MUD 3's Raw Water Petition challenges the rate for untreated *raw water*. This distinction is significant because the petition to review LCRA's potable water retail rates was brought under Texas Water Code Chapter 13 (as was the petition in *Clear Brook City MUD*), but MUD 3's Raw Water Petition was brought under Texas Water Code Chapter 12. Thus, these two cases are governed by different statutes and accompanying administrative regulations. It is incorrect to suggest, as the ALJs do, that a uniform application of § 49.2122 to these two cases is necessary.

B. Raw Water Petition Should be Removed from Request

The focus of the Request should be the impact of § 49.2122 on a retail rate case in which a district has established "different charges, fees, rentals, or deposits among classes of customers."⁸ The only apparent reason that MUD 3's Raw Water Petition has been included in the Request is because LCRA raised the possibility of the application of § 49.2122 in its pleadings and briefs. In Order No. 3, Judge Qualtrough appropriately declined to apply § 49.2122 to MUD 3's Raw Water Petition, instead ruling that other administrative and statutory provisions determined which party would carry the burden of proof.⁹ Further, Judge Qualtrough stated that the legislative history of § 49.2122 suggests that this section only applies to the designation of customer classes, a matter clearly not at issue in MUD 3's Raw Water Petition.

Thus, MUD 3 is being hampered in its efforts to address the merits of its Petition as a result of the abatement of its docket in order to accommodate the presentation of the Request to the Commission, based solely on a pleading by a party to the case arguing for the application of a

⁷ *Appeal of the Retail Water and Wastewater Rates of Lower Colorado River Authority*, SOAH Docket No. 582-08-2863, TCEQ Docket No. 2008-0093-UCR.

⁸ Tex. Water Code Ann. § 49.2122(a) (Vernon 2008).

⁹ Order No. 3 at 12 (March 23, 2009).

statute on which the ALJ deferred any ruling. There are potentially many other rate cases, both wholesale and retail, involving both contractual and tariffed rates, for both potable and raw water (and even reclaimed water or wastewater), in which a party could raise the issue of the application of Texas Water Code § 49.2122 or any other statutory provision. However, the mere fact that a party raises an issue in a docket should not result in that docket being lumped with every other pending docket in which the same statutory issue was raised when there are no other similarities between the cases. When, as here, there is no conflict between ALJ rulings on TCEQ policy or the interpretation of laws, it is inappropriate to virtually consolidate cases to address issues that do not apply to all the cases.

The multiple dissimilarities between MUD 3's Raw Water Petition and the other two dockets make it extremely unlikely that the Commission's consideration of the questions posed by the ALJs will result in any clarity or assistance to the parties or the ALJs in their presentations or determination of the merits of MUD 3's Raw Water Petition. To the extent that the Commission finds any merit in the Request with regard to the application of § 49.2122 to the factual circumstances and issues raised in *Clear Brook City MUD*, the Commission can certainly determine those issues in the absence of MUD 3's Raw Water Petition (and, indeed, in the absence of LCRA's Retail Rate Case).

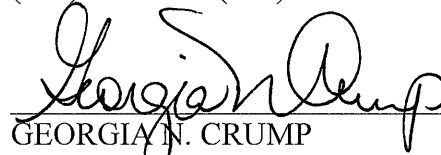
III. CONCLUSION

There is no conflict regarding § 49.2122 or its application or non-application in the three cases that is appropriate for consideration by the Commission. These cases are factually distinct; any analysis of § 49.2122 within the context of these three cases can stand on its own without the aid of the Commission's response to the certified questions. Further, § 49.2122 was never applied by Judge Qualtrough to MUD 3's Raw Water Petition, and it is inappropriate to include MUD 3's Raw Water Petition docket in the Request simply because some of the parties raised

the statute in briefing. Therefore, the Request should be denied, or, if granted, MUD 3's Raw Water Petition docket should be excluded from the Request.

Respectfully submitted,
**LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.**

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A handwritten signature in black ink, appearing to read "Georgia N. Crump", is written over a horizontal line.

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**ATTORNEYS FOR WEST TRAVIS COUNTY
MUNICIPAL UTILITY DISTRICT NO. 3**

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of May 2009, a true and correct copy of the *Brief of West Travis County Municipal Utility District No. 3 Opposing the Request for Answers to Certified Questions* has been served on all parties of record in this proceeding by hand delivery, First Class Mail, or facsimile transmission to the persons listed below:

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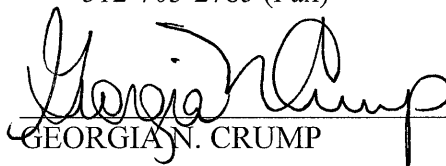
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